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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 248

CENTRAL PACKING COMPANY, INC.,
Petitioner,

vs.

RYDER TRUCK RENTAL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EDWARD A. SMITH
GEORGE SCHWEGLER, JR.
WAYNE F. CASKEY, JR.
1411 Commerce Trust Building
Kansas City, Missouri,
JAMES J. LYSAUGHT
604 Commercial National Bank Building
Kansas City, Kansas,
Attorneys for Petitioner.

Of Counsel:
SMITH, SCHWEGLER & SWARTZMAN,
McANANY, VAN CLEAVE & PHILLIPS.

E. L. MIDDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3080

INDEX

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Constitutional Provision Involved 2
Statement of the Case 3
Reasons for Granting the Writ 4
Summary 10
Conclusion 11
Proof of Service 11
Appendix A1
Opinion of Court Below A1
Judgment A8
Order Denying Appellee's Petition for Rehearing A9
Truck Lease and Service Agreement A10

TABLE OF CASES

Calmar Steamship Corp. v. *Scott*, 345 U.S. 427 (1952) 7
Express Cases, 117 U.S. 1, *mod. in other respects*, 117 U.S. 601 (1886) 7
Greene County v. *Quinlan*, 211 U.S. 582 (1909) 7
Hudson Canal Co. v. *Penna. Coal Co.*, 75 U.S. (8 Wall.) 276 (1869) 6

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Petitioner Central Packing Company, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, which by a divided court reversed a judgment of the United States District Court for the District of Kansas. The District Court judgment had been entered in favor of Petitioner directing a verdict against Respondent at the close of Respondent's evidence.

OPINIONS BELOW

The opinion of the District Court was made orally and is set out in the record (R. 232, 233).

The opinion of the Tenth Circuit Court of Appeals and dissent thereto appears in the Appendix hereto, post, pages A1 to A8, and is reported in 341 F.2d 321.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on January 28, 1965, and appears in the Appendix hereto, at page A8. A timely petition for rehearing was denied on March 17, 1965, which denial appears in Appendix B hereto, at page A9. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Did the Tenth Circuit Court of Appeals in reversing the District Court deprive Petitioner of its right to trial by jury of the factual issue of the breach of the Lease in suit, as guaranteed by the Seventh Amendment to the Constitution of the United States?

2. Did the Tenth Circuit Court of Appeals in reversing the District Court on the legal issue of whether or not there was a requirement of use under the Lease, apply the doctrine or process of "contractual implication" in a manner contrary to the settled rulings and pronouncements of this Court, and accomplish a result contrary to the terms of the Lease and the intention of the parties?

CONSTITUTIONAL PROVISION INVOLVED

The Tenth Circuit Court of Appeals by reversing the District Court and remanding the case for trial as to *remedies only* deprived Petitioner of its right to trial by jury on the issue of breach of the Lease in suit. This ruling

deprived Petitoner of its right to trial by jury secured by the Seventh Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This action was brought by Respondent for the alleged breach of a Truck Lease and Service Agreement (the "Lease") (R. 77, Exhibit Booklet, Exhibit A to Petition, Appendix p. A10).

The case went to trial before a jury in the United States District Court for the District of Kansas on a pretrial order providing for trial by jury (R. 96). Timely demand for trial by jury had been made by Petitioner but was not incorporated in the record since no issue involving the deprivation of this right arose until the majority opinion of the Tenth Circuit Court of Appeals was issued.

A jury was impaneled and sworn (R. 105), and after it heard the Respondent's evidence, the Court sustained Petitioner's motion for a directed verdict as to Counts I and II on the ground that the Lease contained no minimum requirement of use provision with respect to the leased equipment, and accordingly there was no breach by Petitioner.

The jury was discharged and judgment was entered dismissing Counts I and II and it therefore became unnecessary for Petitioner to present its case. Judgment was entered in Respondent's favor on Count III. Count III is not in dispute.

The issue of law before the District Court was whether the language in the Lease that the equipment be used and operated in the "normal and ordinary conduct of business" pertained to "manner of use" only, or imposed a requirement of use or minimum use on Petitioner and its assignees

and sublessees. The District Court found that the Lease contained no requirement of use or minimum use. Accordingly, no consideration was given, no evidence was heard and no jury verdict was reached as to whether a breach would, in fact, have occurred if the clause "normal and ordinary conduct of business" had been interpreted so as to require use or minimum use of the leased equipment.

The majority opinion in reversing the District Court concluded that "normal and ordinary conduct of business" imposed a requirement of use. It went on to hold, as if it did not remain an issue of fact to be passed upon by a jury, that Petitioner had not fulfilled this requirement. The case was therefore remanded for trial on the sole issue of remedies afforded in the Lease. Petitioner contends that by so doing the Tenth Circuit deprived Petitioner of its right to trial by jury on the factual issue as to whether Petitioner did in fact breach the Lease.

REASONS FOR GRANTING THE WRIT

I.

The majority opinion seized upon Petitioner's stipulation of fact (R. 97) in the District Court that it had not made shipments in the motor vehicle equipment after February 13, 1960, to justify its finding of a breach of the Lease as a matter of law. This conclusion was unwarranted since there was no stipulation of fact of any kind as to whether or not the normal and ordinary conduct of Petitioner's business at any particular time was such as to require use. Since a verdict was directed before Petitioner was afforded an opportunity to offer evidence showing that the normal and ordinary conduct of the business did not require use of the leased equipment, this issue should have remained as a question of fact for the jury

to resolve on remand. The majority opinion (Appendix p. A6, 341 F.2d at 324) in bypassing this recognized procedure effectively deprived Petitioner of a trial by jury on the crucial factual issue of whether or not the non-use of the equipment was justified as being consonant with Petitioner's normal and ordinary conduct of business and thus not a breach of the Lease.

It was unnecessary and improper for the majority to conclude that because Petitioner was required to use the equipment in the normal and ordinary conduct of its business, non-use automatically constituted a breach. To illustrate, assume that at the time of the alleged breach all of Petitioner's customers had specified shipment of their purchases by rail, or assume that all shipments at that particular time were to be to locations where rail rates would have been more economical than the rates specified in the Lease. To take a further illustration, assume that the nature of Petitioner's business at the time of the alleged breach and thereafter had so changed that no rolling equipment of any kind was required in its "normal and ordinary" conduct. Under such circumstances, economics or sound business practices, or the "normal and ordinary" conduct of Petitioner's business, would indeed not dictate shipment by means of the leased equipment. These are fact questions for a jury to determine from evidence heretofore not submitted on the question of what was the nature of Petitioner's business and what was the "normal and ordinary" conduct thereof.

We submit that it was improper and erroneous for the Tenth Circuit to have concluded, as a matter of law, that Petitioner had breached the Lease on the basis of a stipulation of only one of many facts necessary to be determined before such a conclusion could be made. Therefore, when the majority sent the case back to the District

Court "for further trial on the remedies provided in the Lease for its breach" (Appendix p. A6, 341 F.2d at 324) it deprived Petitioner of its right to a trial by jury of the issue as to whether there had in fact been a breach of the Lease. This was clearly contrary to the guarantee of trial by jury as provided for in the Seventh Amendment to the Constitution of the United States.

II.

The issue of law before the District Court was whether the Lease in question, and in particular the language therein requiring Petitioner to use and operate the leased equipment in the "normal and ordinary conduct of business", dealt solely with the manner or method of using the equipment or imposed a requirement of use, and defined a standard of use. The District Judge ruled that the Lease did not impose a requirement of use or define a standard of use (R. 232, 233). Although the majority opinion concluded that a requirement of use was implicit in the Lease, the dissenting Circuit Judge would have affirmed the District Judge, concluding that "normal and ordinary conduct of business," was such a general provision that "in the face of the free right to assign and sublease, [it] has no meaning" (Appendix p. A7, 341 F.2d at 325).

We submit that the majority opinion, under the guise of applying the doctrine of contractual implication, imposes an obligation upon the Petitioner which is contradictory to the express language of the Lease and which the parties did not contemplate or intend. Such an application of this doctrine has long been condemned by the settled rulings and pronouncements of this Court. *Hudson Canal Co.* v. *Penna. Coal Co.*, 75 U.S. (8 Wall.) 276, 288-290 (1869) (a covenant to send all of defendant's coal marketed via railroad over plaintiff's canal

would not be implied where no covenant existed in written agreement from which such implication could be made); *Express Cases*, 117 U.S. 1, 28-29 (1886), *mod. in other respects*, 117 U.S. 601 (1886) (a covenant on the part of railroad companies to continue to furnish space to express companies on trains would not be implied where agreement furnished no basis for implication); *Greene County* v. *Quinlan*, 211 U.S. 582, 596 (1909) (while it would have been much wiser for political subdivision to secure additional protection for itself in issuance of bonds, additional covenant would not be implied, court stating that courts cannot make better agreements for parties than parties have made); *Calmar Steamship Corp.* v. *Scott*, 345 U.S. 427, 435 (1952) (implication of the covenants and the contractual interpretation sought in a marine insurance policy would amount to reformation of the policy, a remedy for which the requirements had not been met).

The determination of the foregoing legal issue is far more significant than merely a technical interpretation of the Lease in question. It presents this Court with a significant opportunity to carefully examine its prior position in placing reasonable restrictions and limits on the power of lower courts to impose obligations upon contracting parties by utilizing the doctrine or process of contractual implication. As such, a review of this case could have far reaching effect upon commercial agreements and transactions.

The majority opinion recognizes that the clause in the Lease requiring use of the leased equipment in the "normal and ordinary conduct of business" was a provision "obviously designed to cover every conceivable contingency with respect to the *manner of operation* of the equipment" (Appendix p. A6, 341 F.2d at 324, emphasis added). It then extended the coverage of this provision to encompass a requirement of use (Appendix p. A6, 341 F.2d at

324). This extension had no foundation in the language of the Lease itself since the only obligations imposed upon Petitioner in paragraph 4 (R. 11, Appendix pp. A15-A17) where the clause "normal and ordinary conduct" appears, relates solely to the *method* or *manner* of operating the leased equipment. Moreover, a requirement of use or minimum use could not have been reasonably implied from the Lease as a whole since such an implication is inconsistent with Petitioner's absolute right of assignment set forth in paragraph 5D of the Lease (R. 13, Appendix p. A19).* Under the majority opinion this right of assignment becomes meaningless since the "normal and ordinary conduct" applicable to a meat packer such as Petitioner is totally different from the "normal and ordinary conduct" of an assignee engaged in an unrelated business but yet requiring refrigerated equipment.

Even if it could be contended that a requirement of use could be implied under the Lease, however, the majority opinion erroneously assumes that there is a meaningful or workable *standard of use* in the Lease. The Lease contains no standard of use based on a fixed charge per week and the majority opinion recognizes that it was "the deliberate purpose of the parties not to specify a minimum mileage requirement" (Appendix p. A6, 341 F.2d at 324). It is also clear that the parties did not intend that "normal and ordinary" use of the equipment was to be ascertained during a particular time period after the Lease was entered into, *e.g.*, one month,

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*In point of fact, the Lease was assigned to Central Packing of Kansas, Inc., an entity wholly unrelated to Petitioner, and Petitioner ceased active operations immediately thereafter. Non-use by the assignee was the basis on which Respondent terminated the Lease (R. 237) and brought this action. The assignee, now bankrupt, entered into a separate lease with Respondent containing minimum use requirements (R. 40).

three months, six months, one year or two years. Had this been the intention, it would have been simple enough to have so provided in the Lease itself. Apparently, the parties concluded that any such arbitrary time period would not present an accurate picture of "normal and ordinary" use of the equipment for the purpose of a minimum rent or mileage requirement. As a result of these deliberate omissions the Lease itself gives no basis whatever for the determination of damages in the event of non-use of the equipment. Consequently, as the Lease was written, the concept of "normal and ordinary" use as a determinate of required use can have meaning only in relation to the business Petitioner was actually conducting during the entire term of the Lease.

The failure to supply a meaningful standard of use would have been a critical deficiency even if an absolute right of assignment was not an integral part of the Lease. Once the right of assignment is exercised (as it was), however, and Petitioner is no longer using the equipment, any attempt to determine the extent of the use Petitioner *would* be making of the equipment *if* it were operating the equipment in its business at some future date becomes the purest form of speculation. The only alternative to this fruitless form of speculation, however, would be to apply as a standard of required use the "normal and ordinary" use of the equipment in the conduct of business of any assignee of Petitioner. As pointed out in the dissenting opinion and as implicitly recognized in the majority opinion, however, this approach is likewise ineffectual since the "extent of use can change without limit depending upon the nature of the assignee's or sublessee's business, and this leaves the Court without any measure or standard to determine damages in the event of a breach" (Appendix pp. A7-A8, 341 F.2d at 325).

Petitioner submits that the majority opinion, under the guise of contractual implication, has the effect of writing an agreement between the parties and imposing obligations which were neither contemplated nor intended. It has the further effect of imposing these obligations without any reasonable method or basis for determining the necessary limits or standards with respect thereto. Since similar applications of the doctrine or process of contractual implication have been repeatedly condemned by this Court, and since the use of this process by courts has a broad effect on commercial transactions generally, we ask that the judgment of the Tenth Circuit Court of Appeals be reviewed on this issue.

SUMMARY

1. The majority ruling of the Tenth Circuit Court of Appeals, in reversing the District Court and remanding the case for trial on the issue of remedies alone, deprives Petitioner of its constitutional right to a trial by jury of the question as to whether or not it did in fact breach the Lease in suit.

2. The majority ruling of the Tenth Circuit Court of Appeals, in reversing the District Court on the legal issue of whether or not there was required use of equipment under the Lease, applied the doctrine or process of "contractual implication" in a manner contrary to controlling decisions of this Court, and accomplished a result contrary to the intentions of the parties.

CONCLUSION

For the reasons advanced above, a writ of certiorari should be granted.

Respectfully submitted,

EDWARD A. SMITH
GEORGE SCHWEGLER, JR.
WAYNE F. CASKEY, JR.
1411 Commerce Trust Building
Kansas City, Missouri,
JAMES J. LYSAUGHT
604 Commercial National Bank Building
Kansas City, Kansas,
Attorneys for Petitioner.

Of Counsel:
SMITH, SCHWEGLER & SWARTZMAN,
MCANANY, VAN CLEAVE & PHILLIPS.

PROOF OF SERVICE

I, Edward A. Smith, one of the attorneys of record for Central Packing Company, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on June 10, 1965, I served a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States, on Respondent by mailing a true copy thereof to Russell W. Baker, Watson, Ess, Marshall & Enggas, Counsel of record for Respondent, at 1500 Home Savings Building, 10th and Grand Avenue, Kansas City, Missouri.

Edward A. Smith

EDWARD A. SMITH
1411 Commerce Trust Building
Kansas City, Missouri